Supreme Court, U.S.
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No. _____

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

THE HONGKONG AND SHANGHAI BANKING CORPORATION LIMITED, a foreign corporation,

Petitioner

v.

THE HOOPA VALLEY TRIBE, a federally-recognized Indian Tribe on its own behalf and as parens patriae for its members,

Respondent

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether Indian law preemption doctrine precludes application of a state's commercial law to goods a tribe produces on reservation but sells and transports off reservation.

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THE HOOPA VALLEY TRIBE, a federally-recognized Indian Tribe on its own behalf and as parens patriae for its members,

Respondent[1]

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Hongkong and Shanghai Banking Corporation Limited ("petitioner" or the "Bank")[2] hereby petitions for

[1] All parties to the proceeding in the court of appeals appear in the caption of this case.

[2] Petitioner's parent company is HSBC Holdings PLC; petitioner's only subsidiary (except any wholly owned subsidiary) is Hongkong Bank Ltd.

a writ of certiorari to review the decision of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, 1a-12a, *infra*) is reported at 30 F.3d 1138 (9th Cir. 1994). The amended order of the district court granting plaintiff's motion for partial summary judgment (App. B, 13a-27a, *infra*) is reported at 143 B.R. 563 (N.D. Cal. 1992). The order of the court of appeals denying rehearing (App. C, 28a-29a, *infra*) is not reported.

JURISDICTION

The opinion of the court of appeals was filed July 25, 1994. Rehearing was denied September 27, 1994. This Court has jurisdiction under 28 U.S.C. § 1254.

STATUTES AND REGULATIONS INVOLVED

25 U.S.C. § 407 provides for the sale of tribal timber as follows:

> Under regulations prescribed by the Secretary of the Interior, the timber on unallotted trust land in Indian reservations or on other land held in trust for tribes may be sold in accordance with the principles of sustained-yield management or to convert the land to a more desirable use. After deduction, if any, for administrative

> expenses under section 413 of this title, the proceeds of the sale shall be used--
>
> (1) as determined by the governing bodies of the tribes concerned and approved by the Secretary, or
>
> (2) in the absence of such a governing body, as determined by the Secretary for the tribe concerned.

25 C.F.R. § 163.12 states:

> Except as provided in § 163.19, in sales of timber with an appraised stumpage value exceeding $10,000, the contract forms approved by the Secretary must be used unless a special form for a particular sale or class of sales is approved by the Secretary. Essential departures from the fundamental requirements of standard and approved contract forms shall be made only with the approval of the Secretary. Unless otherwise directed, the contracts shall require that the proceeds be paid by remittance drawn to the Bureau of Indian Affairs and transmitted to the Superintendent. By mutual agreement, contracts may be extended, modified, or assigned subject to approval of the approving officer, and may be terminated by the approving officer upon completion or by mutual agreement.

Public Law No. 280, 67 Stat. 588 (1953), as amended, providing (in part) for state civil jurisdiction in

actions to which Indians are parties, is codified at 28 U.S.C. § 1360 and provides:

> (a) Each of the States listed in the following table shall have jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in the areas of Indian country listed opposite the name of the State to the same extent that such State has jurisdiction over other civil causes of action, and those civil laws of such State that are of general application to private persons or private property shall have the same force and effect within such Indian country as they have elsewhere within the State:
>
> | *State of* | *Indian country affected* |
> |---|---|
> | Alaska . . . . . | All Indian country within the State |
> | California . . | All Indian country within the State |
> | Minnesota . . | All Indian country within the State, except the Red Lake Reservation |
> | Nebraska . . . | All Indian country within the State |
> | Oregon . . . . | All Indian country within the State, except the Warm Springs Reservation |
> | Wisconsin . . | All Indian country within the State |

(b) Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto; or shall confer jurisdiction upon the State to adjudicate, in probate proceedings or otherwise, the ownership or right to possession of such property or any interest therein.

(c) Any tribal ordinance or custom heretofore or hereafter adopted by an Indian tribe, band, or community in the exercise of any authority which it may possess shall, if not inconsistent with any applicable civil law of the State, be given full force and effect in the determination of civil causes of action pursuant to this section.

STATEMENT OF THE CASE

This case concerns a sale and delivery of logs harvested from Indian timber to an off-reservation non-Indian purchaser who failed to pay for the logs. At issue are conflicting claims of a bank with a perfected security interest in the logs and The Hoopa Valley Tribe (the

"Tribe") which argues that federal Indian law preempts state commercial law.

In the summer of 1990, the Tribe entered into a transaction for the sale of logs to Blue Lake Forest Products, Inc. ("Blue Lake"), a non-Indian purchaser that operates an off-reservation mill. 30 F.3d at 1140 (App. A, 3a-4a). Two agreements were involved. On June 27, 1990, the Tribe "concluded a written [Timber Sale Contract] with Hoopa Forest Industries ('HFI'), a business venture wholly owned by the tribe," for sale of tribal timber to the tribal enterprise. 30 F.3d at 1139 (footnote omitted) (App. A, 3a). (ER 28-78.)[3]

The sale to HFI was effected pursuant to 25 U.S.C. § 407, which provides that "timber on unallotted trust land in Indian reservations . . . may be sold" "[u]nder regulations prescribed by the Secretary of the Interior." The regulations are at 25 C.F.R. part 163,[4] and require, subject to certain exceptions, the use of "contract forms approved by the Secretary." 25 C.F.R. § 163.12. The approved forms include in their "Standard Provisions" the general condition that "[t]itle to the timber covered by the contract shall not pass to the Purchaser until it has been scaled, paid for, and removed from the contract area." (ER 73.) The Timber Sale Contract included this provision. The Secretary of the Interior approved the agreement. (ER 32.)

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[3] "ER" refers to the excerpts of record filed with the opening brief of appellant in the Ninth Circuit.

[4] These regulations are "extensive in scope." 30 F.3d at 1142 (App. A, 11a). *See also White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 145-47 (1980).

Contemporaneously, HFI contracted with Blue Lake for the sale of harvested logs. (ER 79-103.) This Log Purchase Agreement does not include the provision requiring payment before title will pass and permits payment to be made after title to the logs has passed to Blue Lake. The Secretary approved this agreement. (ER 95-96.)

At the time it filed for bankruptcy, Blue Lake had failed to pay HFI "approximately $950,000" for logs delivered by the Tribe to the Blue Lake mill and "was holding approximately 1.5 to 2 million board feet of Hoopa Valley logs." 30 F.3d at 1140 (App. A, 4a).

Petitioner, a major lender and creditor of Blue Lake, asserted a claim to the logs (or the proceeds of their sale)[5] on the basis of a security interest in Blue Lake's inventory that was perfected under California commercial law. The Tribe claimed a superior interest under federal law because the logs had not been paid for.

The district court obtained jurisdiction when this proceeding was transferred from the bankruptcy court to the district court pursuant to 28 U.S.C. § 157(d). *See also* 28 U.S.C. §§ 1331, 1362.

In the district court, the Bank argued that state commercial law applied and that petitioner should prevail as a "good faith purchaser" under U.C.C. § 2-403(1). 143 B.R. at 566 (App. B, 19a). The Tribe argued that federal law regarding the alienation of Indian timber

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[5] Blue Lake processed the logs subject to a Stipulated Order that "provided that all payments by Blue Lake to the Bank would be subject to the same claims that existed against logs possessed by Blue Lake." 143 B.R. at 566 (App. B, 18a).

preempted the application of the U.C.C. 143 B.R. at 566 (App. B, 19a).[6]

The district court rejected the Bank's "implicit assumption that the court should apply the same analysis . . . as it would in a case not involving tribal trust property." 143 B.R. at 567 (App. B, 21a). The court relied on 28 U.S.C. § 1360(b) and this Court's construal of "Section 1360(b) as precluding the enforcement of judgments that 'effectively result' in the alienation or encumbrance of tribal trust property." 143 B.R. at 568 (citing *Bryan v. Itasca County*, 426 U.S. 373, 391 (1976)) (App. B, 23a). Resolving doubts regarding section § 1360(b) in favor of the Indians, the court "conclud[ed] that the Bank [was] precluded from asserting over the Tribe its priority in the proceeds from the logs, notwithstanding that the Bank *may* have prevailed as a 'good faith purchaser' if U.C.C. principles had been applied." 143 B.R. at 568 (district court emphasis) (footnote omitted) (App. B, 24a).

The Ninth Circuit affirmed. The court found that "federal law affords heightened protection to timber the United States holds in trust for Indian tribes" and addressed "whether this principle preempts the application of state commercial law in [this] case." 30 F.3d at 1141 (App. A, 7a). Recognizing that the type of preemption inquiry is critically dependent on whether "the conduct at

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[6] The Tribe also argued that "it prevails even if federal law regarding the alienation of Indian timber does not preempt the application of U.C.C. principles to this case, because the Bank . . . is not [a] 'good faith purchaser.'" 143 B.R. at 566 (App. B, 19a). The district court did not reach this question.

issue" takes place on or off the reservation, the court concluded that this case should be considered "an on-reservation case for purposes of preemption because the essential conduct at issue occurred on the reservation." 30 F.3d at 1141 (App. A, 8a). Applying the balancing test of *White Mountain Apache*, 448 U.S. 136, the Ninth Circuit concluded that federal law preempts state commercial law in this case. 30 F.3d at 1142-43 (App. A, 12a).

The circuit court denied rehearing (App. C, 28a).

REASONS FOR GRANTING THE PETITION

This case presents an important and challenging issue of first impression, involving the intersection of federal Indian law and the Uniform Commercial Code. The petition should be granted to address whether the teaching of *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973), is alive and well and whether "the off-reservation activities of Indians"--in this case, selling logs cut from tribal timber to an off-reservation purchaser--are "subject to the prescriptions of a 'nondiscriminatory state law' in the absence of 'express federal law to the contrary.'" *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 335 n.18 (1983) (quoting *Mescalero Apache Tribe v. Jones*, 411 U.S. at 148-49).

I.

The decision below affects unfavorably the federal goal of tribal economic development.

Economic self-sufficiency is a key to tribal well-being. Increasingly, tribes seek to develop reservation resources and take their goods into the marketplace. Success of these ventures depends upon whether those who would deal with tribes and tribal products can do so with reasonable commercial certainty. Central in this regard is knowledge of what law applies when Indian goods leave the reservation and are placed in the general stream of commerce.

In this case, the court of appeals has held, in effect, that because the goods in question (logs) began their life as tribal trust property (trees), the heightened federal protection that attaches to trust property follows the goods off the reservation, preempting state commercial law as to priority of rights in the goods and their proceeds.

The Ninth Circuit decision conflicts with the teachings of this Court and will prove disadvantageous in the long run to the economic interests of reservation Indians. The issue of whether state law generally applies to the sale of tribal goods in the off-reservation market is deserving of the Court's attention.

II.

The decision below deviates substantially from applicable decisions of this Court.

The companion cases of *McClanahan v. Arizona Tax Comm'n*, 411 U.S. 164 (1973), and *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973), articulated the framework principles of Indian preemption law. *McClanahan* held that the historical sovereignty of Indian tribes provides a "backdrop" for an inquiry whether federal law preempts state law. *McClanahan*, 411 U.S. at 172.[7] As a consequence, express federal law is not required for state law to be preempted when Indian activity within Indian country is at issue. 411 U.S. at 174-75.[8] "In the case of 'Indians going beyond reservation boundaries,' however, 'a nondiscriminatory state law' is generally

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[7] *See also White Mountain Apache*, 448 U.S. at 143 ("The tradition of Indian sovereignty over the reservation and tribal members must inform the determination whether the exercise of state authority has been pre-empted by operation of federal law.") (citation omitted). *See generally* Charles F. Wilkinson, *American Indians, Time, and the Law* 94 (1987).

[8] *See also White Mountain Apache*, 448 U.S. at 144 (With on-reservation conduct the Court has "rejected the proposition that in order to find a particular state law to have been preempted by operation of federal law an express congressional statement to that effect is required.") (citation omitted) (footnote omitted). *See generally* Wilkinson, *supra*, at 94.

applicable in the absence of 'express federal law to the contrary.'" 448 U.S. at 144 n.11 (quoting *Mescalero Apache Tribe v. Jones*, 411 U.S. at 148-49).[9]

The Ninth Circuit failed to recognize that because the Tribe engaged in commercial activity beyond reservation boundaries, *Mescalero Apache* provides the applicable authority of this Court.

A. This case arises out of commercial activity conducted by the Tribe beyond reservation boundaries, and therefore--contrary to the decision below--state commercial law governs, unless there is "express federal law" to the contrary.

The Tribe, through its wholly owned business venture HFI, contracted to sell harvested tribal timber to Blue Lake, an off-reservation mill.[10] "Between July 1,

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[9] *See also Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 176-81 (1980) (Rehnquist, J., concurring and dissenting). *See generally* F. Cohen, *Handbook of Federal Indian Law* 277 (1982 ed.) ("In most respects, tribes are . . . subject to state law outside of Indian country."); Wilkinson, *supra*, at 95.

[10] The agreement recites that it was executed in duplicate; by Blue Lake at Arcata, California, and by HFI at Hoopa, California.

1990 and October 31, 1990, HFI cut, scaled[11] and delivered to Blue Lake a net volume of 11,565,120 board feet of Reservation timber." 143 B.R. at 565 (App. B, 17a). Blue Lake paid for the deliveries for July and August, but not for deliveries made in September and October 1990. 143 B.R. at 565-66 (App. B, 17a). The Tribe and the Bank dispute who has the superior right to the value of these unpaid for logs. At issue is what law applies.

Mescalero Apache supplies the applicable Indian law principle. The Hoopa Indians extended their commercial activity beyond reservation boundaries by contracting to sell tribal timber to an off-reservation purchaser and by delivering the contract timber to the off-reservation mill. Under *Mescalero Apache*, in the absence of "express federal law to the contrary," the Uniform Commercial Code (as adopted by the State of California) governs the parties' rights in the property.

The Ninth Circuit rejected this approach; it applied instead the *White Mountain Apache* balancing test. *White Mountain Apache* presented this Court with a question of "the extent of state authority over the activities of non-Indians engaged in commerce on an Indian reservation." 448 U.S. at 137. In particular, the State of Arizona sought to impose a motor carrier license tax on a non-Indian logging company that operated entirely on an Indian reservation. The Court explained that cases in which "a State asserts authority over the conduct of

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[11] The Blue Lake contract provided that the scaling location would be Blue Lake's off-reservation log yard. (ER 103.)

non-Indians engaging in activity on the reservation" call for "a particularized inquiry into the nature of the state, federal, and tribal interests at stake . . . to determine whether, in the specific context, the exercise of state authority would violate federal law." 448 U.S. at 144-45 (citations omitted). The Court held that the state tax was preempted by federal law.

Applying this balancing test, the circuit court held that federal law preempts the U.C.C. because extensive federal regulation of timbering on Indian land shows a federal interest that outweighs the state's interest "in seeing its law applied uniformly and in protecting good faith purchasers." 30 F.3d at 1142 (App. A, 11a).

The circuit court erred in treating *White Mountain Apache* as controlling authority, because Blue Lake was not "engaged in commerce on an Indian reservation" when it purchased reservation logs.[12]

The Ninth Circuit recognized that *Mescalero Apache* should apply if "relevant activities [occur] off-reservation," 30 F.3d at 1141 n.6 (App. A, 8a), but "deem[ed]" this "an on-reservation case for purposes of preemption." 30 F.3d at 1141 (App. A, 8a). The court reasoned:

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[12] Compare, for example, two cases in which the Court has conducted the *White Mountain Apache* test: *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163 (1989) (state severance tax on non-Indian lessee's oil and gas production from on-reservation wells not preempted), and *Ramah Navajo Sch. Bd. v. Bureau of Revenue of New Mexico*, 458 U.S. 832 (1982) (state gross receipts tax on the construction of school facilities on tribal lands by non-Indian contractor preempted).

> [T]he essential conduct at issue occurred on the reservation: the severance of timber and its removal without proper compensation, in contravention of the governing contract and federal regulations. Furthermore, the Indian enterprise at the heart of this dispute--the timbering lands--is located on, not off, the reservation.

30 F.3d at 1141 (citation omitted) (App. A, 8a-9a).

These considerations do *not* show that Blue Lake engaged in commerce on the reservation or that the Tribe did not extend its commercial activity beyond reservation boundaries. The severance of the timber was done by the Tribe through HFI, not by Blue Lake. The removal of the harvested timber--the entire operation whereby felled trees were reduced to logs and ultimately trucked off-reservation for delivery to the Blue Lake mill--was also done entirely by HFI.

Blue Lake's nonpayment for the logs breached its contract with HFI. Petitioner disputes whether this breach was "in contravention of . . . federal regulations."[13] But even if it was, it was the Tribe, through HFI, that removed the logs from the reservation. Blue Lake simply agreed to purchase the logs and accepted delivery at its off-reservation mill.

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[13] As explained below, federal *regulations* do not require that the Tribe receive payment before title to tribal timber passes to a purchaser. The Tribe's *contract* with its subsidiary HFI does contain a provision to that effect, although Blue Lake's Log Purchase Agreement does not require this.

Finally, the logs were grown and harvested on reservation land. But they were sold and delivered to an off-reservation purchaser, as would be true of any goods manufactured on a reservation, and offered for sale in the off-reservation market. This case presents off-reservation commercial activity by the Tribe; it does not present on-reservation commerce by Blue Lake. The distinction makes *Mescalero Apache* the applicable authority and points up the error of the Ninth Circuit.

B. There is no "express federal law" that preempts the application of nondiscriminatory state commercial law to off-reservation commercial activity of Indians.

Two candidates were offered below as preemptive federal laws: 28 U.S.C. § 1360 (state civil jurisdiction in actions to which Indians are parties) and 25 U.S.C. § 407 (sale of timber on unallotted lands). Neither preempts state commercial law in this instance.

1. Public Law 280, as codified at 28 U.S.C. § 1360(b), does not preempt state commercial law.

The district court held that PL 280, as codified at 28 U.S.C. § 1360(b), preempts state commercial law in this case. 143 B.R. at 568 ("[T]he Bank is precluded from asserting over the Tribe its priority in the proceeds from the logs, notwithstanding that the Bank *may* have prevailed as a 'good faith purchaser' if U.C.C. principles had been applied.") (district court emphasis) (footnote omitted),

(App. B, 24a). The district court relied on its reading of *Bryan v. Itasca County*, 426 U.S. at 391, as holding that "section 1360(b) . . . prohibit[s] state courts 'from applying state laws or enforcing judgments in ways that would *effectively result in* the "alienation, encumbrance, or taxation" of trust property.'" 143 B.R. at 567 (district court emphasis) (App. B, 22a).

The Ninth Circuit, in affirming the district court, did not discuss the specifics of the lower court's preemption holding or reasoning. The circuit court relied on 28 U.S.C. § 1360 only to the extent that it provides support for the proposition that "federal law offers heightened protection for property the United States holds in trust for Indian tribes." 30 F.3d at 1141 (App. A, 7a). Conducting a *White Mountain Apache* balancing, the court concluded that "to the extent there is a conflict between state commercial law and federal laws affording heightened protection to Indian trust timber, the former must give way." 30 F.3d at 1142 (App. A, 12a).

Nothing in PL 280, in this Court's interpretation in *Bryan v. Itasca County*, or elsewhere, exempts the application of state commercial law to commercial disputes arising from off-reservation activities of Indians.[14] Applying state commercial law in this case results in an

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[14] Indeed, 28 U.S.C. § 1360(a) provides that the "civil laws of [the state of California] that are of general application to private persons or private property shall have the same force and effect within . . . Indian country [within the state] as they have elsewhere within the State." *Bryan v. Itasca County* does not rule out reading this to extend state commercial law to Indian country within PL 280 states.

"alienation" of tribal trust property only in the sense that under U.C.C. principles the Bank's right to the proceeds from the logs is superior to that of the Tribe. But nothing in PL 280 or elsewhere in federal law says that Indians must win all commercial disputes. Section 1360(b) is not an "express federal law" preempting state law from governing off-reservation commercial disputes involving Indians.

2. 25 U.S.C. § 407 and implementing regulations do not preempt state commercial law.

The Tribe and the United States as amicus curiae for the Tribe argued in the circuit court that 25 U.S.C. § 407 preempts the U.C.C. in this case. Their argument is that the statute and its implementing regulations require that the Tribe receive payment for its timber before title can pass to a purchaser of logs. The circuit court apparently accepted the reasoning.[15] The reasoning, however, is flawed.

First, the U.C.C. favors petitioner in this instance because in a dispute between a seller who has not been paid for goods delivered to a buyer and a party with a security interest in the goods, the secured party prevails. Blue Lake, although it had failed to pay HFI for logs delivered to the mill, nonetheless acquired "voidable title" to the logs, i.e., the "power to transfer a good title to a good

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[15] The court states: "25 U.S.C. § 407 and 25 C.F.R. § 163 . . . specify that title to Indian timber held in trust by the United States cannot pass until the buyer first pays for it." 30 F.3d at 1140 (footnote omitted) (App. A, 3a).

faith purchaser for value." U.C.C. § 2-403(1). *See* 30 F.3d at 1140 ("'[A]n initial buyer has full power to convey good title even if . . . it *fails to make the cash payment called for.*'") (quoting *In re Coast Trading Co.*, 744 F.2d 686, 690 (9th Cir. 1984) (circuit court emphasis) (App. A, 5a). The Bank, with its perfected security interest in the inventory of Blue Lake, had the status of a purchaser of the logs. U.C.C. § 1-201(32). Thus, under U.C.C. principles the Bank prevails in this case.[16] The question, then, is whether "express federal law" preempts the application of the U.C.C. in this case.

25 U.S.C. § 407 authorizes the sale of tribal timber from unallotted trust land "[u]nder regulations prescribed by the Secretary of the Interior." No one claims that this statute, per se, expressly preempts state commercial law in this instance.

Nor is it claimed that the Secretary's regulations expressly require that title to Indian timber not pass until the purchaser has paid for it.

The argument of the Tribe and the United States rather is premised on the fact that 25 C.F.R. § 163.12 requires generally that sales of Indian timber use "contract forms approved by the Secretary" unless the Secretary approves "a special form for a particular sale or class of sales." The Tribe's timber contract with its subsidiary HFI includes a set of "Standard Provisions," among which is paragraph B2.1, which addresses "Title and Risk of Loss." This states (in part): "Title to the timber covered by the contract shall not pass to the Purchaser until it has been

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[16] Or, strictly speaking, it will prevail if it sustains its claim to be a "good faith purchaser" on remand to the district court.

scaled, paid for, and removed from the contract area." (ER 73.) In this case, Blue Lake did not pay for some of the logs it received from HFI, and HFI did not pay for the timber that became those logs. The Tribe and the United States contend that because HFI did not pay for the timber, federal law prohibits Blue Lake from receiving title to the logs and preempts state commercial law under which petitioner would otherwise prevail over the Tribe.

This argument fails because it assumes that the terms of a federally approved contract carry the force of federal law. This is not so. When the Secretary approved the timber contract, the contract became a free-standing document, not a public law. Thus, when the tribal subsidiary HFI failed to pay the Tribe for contract timber, HFI breached its agreement with the Tribe but did not thereby violate federal law. 25 U.S.C. § 407 and the Secretary's implementing regulations do not add up to an "express federal law" countermanding the application of standard U.C.C. principles to the dispute in this case.[17]

This Court has often observed that the federal government has a "goal of encouraging 'tribal self-sufficiency and economic development.'" *New Mexico v.*

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[17] Moreover, the repugnancy of the argument of the Tribe and the United States is brought out by considering that on their position, even if Blue Lake had paid HFI in full for the logs, Blue Lake could not pass title to a good faith purchaser if HFI had not paid the Tribe. In other words, the opposing position is that tribes may go into the marketplace with their goods on a "no lose" basis. If a Tribe is not paid, for whatever reason, it can assert a superior right to what has become of the marketed tribal resources wherever the product may be found.

Mescalero Apache Tribe, 462 U.S. at 335 (quoting *White Mountain Apache*, 448 U.S. at 143). The goal is reflected in the Secretary's stated objective that the management of Indian forest lands facilitate "[t]he sale of Indian timber on the open market." 25 C.F.R. § 163.3(e). This federal policy is not furthered by a judicial rule that permits Indians to engage in commerce outside the reservation, but shelters them from the application of nondiscriminatory state commercial law. *Colville*, 447 U.S. at 180 n.6 ("Congress intended that the Indians be prepared to 'enter the white world on a footing of equal competition.' 411 US, at 157") (Rehnquist, J., concurring and dissenting).

CONCLUSION

The court of appeals has created what amounts to an Indian exception to the Uniform Commercial Code. Petitioner requests that this Court issue a writ of certiorari and address whether Indians who engage in commercial activity beyond the reservation are subject to the same

nondiscriminatory state commercial laws as other marketplace participants.

Respectfully submitted,

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November 9, 1994

Appendix A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

In re BLUE LAKE FOREST PRODUCTS, INC., a California corporation,	)	No. 92-16622
	)	D.C. No. C91-1911-SBA
Debtor.	)	Filed: July 25, 1994
The HOOPA VALLEY TRIBE, a federally-recognized Indian Tribe, on its own behalf and as parens patriae for its members,	)	Cathy A. Catterson, Clerk U.S. Court of Appeals
	)	OPINION
Plaintiff-Appellee,	)	
v.	)	

HONGKONG AND SHANGHAI BANKING CORPORATION, LIMITED, a foreign corporation,

Defendant-Appellant,

and

BLUE LAKE FOREST PRODUCTS, INC., a California corporation; BRUCE TAYLOR, SR., and SUSAN F. TAYLOR,

Defendants.

Appeal from the United States
Court of Appeals, Ninth Circuit

Argued and Submitted February 9, 1994

Decided July 25, 1994

FLETCHER, KOZINSKI and TROTT, Circuit Judges:

PER CURIAM:

We decide the extent to which federal limitations on the alienation of Indian trust timber supersede the Uniform Commercial Code.

I.

This dispute, which we review following a grant of summary judgment, is over who gets the proceeds from a sale of logs that the United States originally held in trust for the Hoopa Valley Indian Tribe ("the tribe").

Our story begins on June 27, 1990, when the tribe and the United States, as its trustee, concluded a written agreement with Hoopa Forest Industries ("HFI"), a business venture wholly owned by the tribe.[1] The contract (the "Timber Sale Contract") called for the sale of timber from the tribe's Pine Creek L Logging Unit to HFI, SER 3-4, and cross-referenced a set of statutory provisions and regulations--25 U.S.C. § 407 and 25 C.F.R. § 163--which specify that title to Indian timber held in trust by the United States cannot pass until the buyer first pays for it.[2] ER 28, 72.

HFI in turn contracted with Blue Lake Forest Products, Inc. ("Blue Lake"), a non-Indian buyer. ER 79-103. Under the HFI-Blue Lake agreement (the "Log Purchase Agreement"), HFI sold the logs to Blue Lake, which planned to turn them into lumber at its off-

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[1]To be precise, HFI is wholly owned by the Hoopa Valley Development Enterprise, which is wholly owned by the tribe.

[2]In particular, section B2.1 of the Timber Sale Contract Part B Standard Provision states that "title to the timber covered by the contract shall not pass to the Purchaser until it has been scaled, *paid for*, and removed from the contract area." ER 107 (emphasis added).

reservation mill. *Id.* Blue Lake signed the agreement with knowledge of the Timber Sale Contract, SER 17, and the Log Purchase Agreement incorporated the relevant federal provisions and regulations.[3] ER 79.

With this framework in place, HFI delivered approximately 11.6 million board feet of timber to Blue Lake between July 1, 1990, and October 31, 1990. SER 7. Blue Lake, however, failed to pay approximately $950,000 for the September and October deliveries. *Id.* HFI, in turn, didn't make payments to the tribe under the Timber Sale contract. Blue Lake then filed for bankruptcy, at which time it was holding approximately 1.5 to 2 million board feet of Hoopa Valley logs. *Id.* The same day, Blue Lake received a notice from the Bureau of Indian Affairs saying the logs hadn't been paid for and demanding that Blue Lake cease any processing.

On February 20, 1991, the bankruptcy court issued an order permitting Blue Lake to process and sell the HFI logs, and then deposit the proceeds with the Hongkong and

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[3]Paragraph 2 of the Log Purchase Agreement reads as follows:

> No provision of this Agreement will be interpreted or enforced in any manner which violates Title 25 U.S.C. § 407, or any other provision of federal law, or the regulations established by the Secretary of the Interior for Indian timber management found in Part 163 of Title 25, Code of Federal Regulations, which laws and regulations are incorporated herein.

ER 107.

Shanghai Banking Corporation ("the bank"), with the tribe's claim to follow the proceeds. SER 7-8. But the bank had a claim of its own--a security interest in Blue Lake's after-acquired inventory.

Which brings us to the dispute before us. Both the tribe and the bank claim the proceeds from the log sale. It's clear, of course, that title to the logs never passed because the buyer (Blue Lake) never paid for them. The tribe says, therefore, that the logs never ceased being its property, and so it--not the bank--is entitled to the money.

The bank argues that things are not so simple. Relying on the Uniform Commercial Code, the bank styles itself a good faith purchaser who, under UCC § 2-403, can take good title even when the party purporting to sell the property--here Blue Lake, which gave the bank a security interest--had voidable title. *See In re Coast Trading Co.*, 744 F.2d 686, 690 (9th Cir.1984) ("[A]n initial buyer has full power to convey good title even if it subsequently fails to honor its check or it *fails to make the cash payment called for.*") (emphasis added).

The tribe waives aside these commercial law principles. Rather, the tribe says, we must resolve this dispute under federal law, with particular attention to the heightened protection federal law affords property held in trust for an Indian tribe. This principle, the tribe argues, preempts the application of state commercial law.

The district court accepted this argument and granted summary judgment; we review de novo. *Jones v. Union Pac. R.R.*, 968 F.2d 937, 940 (9th Cir.1992).

II.

It's clear that federal law affords heightened protection to timber the United States holds in trust for Indian tribes. This is evident in the federal regulations discussed above, which require a special form of contract for alienating trust timber: Timber sales in excess of $10,000 generally can be conducted only pursuant to a contract approved by the Secretary--that is, one that prevents passage of title until payment is made. 25 C.F.R. § 163.12. Moreover, "[e]ssential departures from the fundamental requirements of standard and approved contract forms shall be made only with the approval of the Secretary." *Id.*

But that's not all. In authorizing state courts to adjudicate civil actions arising in "Indian country," *see* 28 U.S.C. § 1360, Congress specifically prevents state courts from encumbering or alienating tribal assets held in trust, and from promulgating state law rules inconsistent with the federal law on this subject. *See* 28 U.S.C. § 1360(b).[4] In so doing, Congress emphasized the special

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[4]The text of this provision is as follows:

(b) Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such

(continued...)

nature of the trust relationship between the United States and Indian property, a relationship upon which states are not free to intrude. *See Bryan v. Itasca County*, 426 U.S. 373, 391, 96 S.Ct. 2102, 2112, 48 L.Ed.2d 710 (1976).

There can be little question, then, that federal law offers heightened protection for property the United States holds in trust for Indian tribes. The question is whether this principle preempts the application of state commercial law in the case before us.[5]

III.

"[Q]uestions of pre-emption in [Indian law] are not resolved by reference to standards of pre-emption that have developed in other areas of the law ...," *Cotton Petroleum*

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[4](...continued)
property in a manner inconsistent with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto....
28 U.S.C. § 1360(b).

[5]Preemption is, in fact, just one of "two independent but related barriers to the assertion of state regulatory authority over tribal reservations...." *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 142-43, 100 S.Ct. 2578, 2583, 65 L.Ed.2d 665 (1980). The other, tribal self-government, is not at issue here. *See id.*; *see also Dept. of Taxation and Fin. of New York v. Milhelm Attea & Bros.*, No. 93-377, 1994 WL 249582 (U.S. June 13, 1994) (upholding New York's taxation of wholesale cigarettes sold by suppliers who sell cigarettes to reservations).

Corp. v. New Mexico, 490 U.S. 163, 176, 109 S.Ct. 1698, 1707, 104 L.Ed.2d 209 (1989); *see also White Mountain Apache*, 448 U.S. at 143, 100 S.Ct. at 2583, at least where the conduct at issue takes place on, rather than off, the reservation.[6] *See White Mountain Apache*, 448 U.S. at 144, 100 S.Ct. at 2584; *cf. Pacific Gas & Elec. Co. v. State Energy Resources Comm'n*, 461 U.S. 190, 206, 103 S.Ct. 1713, 1723, 75 L.Ed.2d 752 (1983) (non-Indian law preemption).

Even though this case implicates an off-reservation relationship between two non-Indian actors (Blue Lake and the bank), we deem it an on-reservation case for purposes of preemption because the essential conduct at issue occurred on the reservation: the severance of timber and

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[6]In contrast, where the relevant activities occurred off-reservation, general preemption standards usually do apply. *See Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148-49, 93 S.Ct. 1267, 1270-71, 36 L.Ed.2d 114 (1973) (state taxation scheme applied to Indian-owned ski resort located off reservation); Charles F. Wilkinson, *American Indians, Time, and the Law* 95 (1987). Under these standards, federal law preempts state law in three situations: 1) where federal law does so explicitly; 2) where the federal scheme is so pervasive that Congress must have intended preemption; and 3) where state law would thwart the achievement of Congress's purposes. *See Wisconsin Pub. Intervenor v. Mortier*, ___ U.S. ___, ___ - ___, 111 S.Ct. 2476, 2481-82, 115 L.Ed.2d 532 (1991).

its removal without proper compensation, in contravention of the governing contract and federal regulations. Furthermore, the Indian enterprise at the heart of this dispute--the timbering lands--is located on, not off, the reservation. *Cf. Mescalero*, 411 U.S. at 148-49, 93 S.Ct. at 1270-71 (ski resort located off-reservation).

When on-reservation conduct involves both Indians and non-Indians,[7] we must undertake "a particularized inquiry into the nature of the state, federal, and tribal interests at stake, an inquiry designed to determine whether, in the specific context, the exercise of state authority would violate federal law." *White Mountain Apache*, 448 U.S. at 145, 100 S.Ct. at 2584; *see also Gila River Indian Community v. Waddell*, 967 F.2d 1404, 1408 (9th Cir. 1992) ("Rather than relying on the normal principles of preemption, the Court has declared that a determination as to whether a state's efforts to regulate non-Indians engaging in on-reservation activity are preempted 'call[s] for a particularized inquiry into the nature of the state, federal, and tribal interests at stake'....") (quoting *White Mountain Apache*, 448 U.S. at 145, 100 S.Ct at 2584-85). This makes Indian law preemption broader than traditional preemption: That is,

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[7]In contrast, "[w]hen on-reservation conduct involving only Indians is at issue, state law is generally inapplicable...." *White Mountain Apache*, 448 U.S. at 144, 100 S.Ct. at 2584. This principle doesn't govern here because Blue Lake and the bank are not Indian entities.

in the Indian law context, state law is preempted not only by an explicit congressional statement--the traditional preemption standard--but also if the balance of federal, state and tribal interests tips in favor of preemption. *Id.* at 1407-08.

In conducting this balancing,[8] we note that federal interests are very extensive and normally prevail over state interests in the regulation of timbering on Indian reservations. *See White Mountain Apache*, 448 U.S. at 149, 100 S.Ct. at 2586-87 ("[T]he Federal Government has undertaken to regulate the most minute details of timber production...."). Federal regulation of timbering on Indian land is an old and well established practice. *See, e.g., United States v. Mitchell*, 445 U.S. 535, 100 S.Ct. 1349, 63 L.Ed.2d 607 (1980); *United States v. Algoma Lumber Co.*, 305 U.S. 415, 59 S.Ct. 267, 83 L.Ed. 260 (1939); *Pine River Logging Co. v. United States*, 186 U.S. 279, 22 S.Ct. 920, 46 L.Ed. 1164 (1902); *United States v. Cook*, 86 U.S. (19 Wall) 591, 22 L.Ed. 210 (1874). It is also explicitly authorized by Congress, *see* 25 U.S.C.

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[8]Our decision stands in contrast to *Red Mountain Mach. Co. v. Grace Inv. Co.*, 29 F.3d 1408 (9th Cir.1994), where we did not have to conduct this balancing because the Secretary of the Interior had determined that use of state law was appropriate. *Id.* at 1412. Here no such determination has been made.

§ 407;[9] *United States v. Mitchell*, 463 U.S. 206, 209, 103 S.Ct. 2961, 2963-64, 77 L.Ed.2d 580 (1983), and extensive in scope, *see, e.g.*, 25 C.F.R. § 163.[10] Finally, under *Mitchell*, the United States, as trustee, has a fiduciary obligation to protect, manage and operate Indian lands, including Indian timber.

In contrast, state interests are rather meager here. While the state presumably has an interest in seeing its law applied uniformly and in protecting good faith purchasers, that interest is diminished with respect to those dealing with Indian entities or in Indian country. It is too late in the day for someone in the bank's position to claim surprise that federal law, not state law, governs a

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[9]25 U.S.C. § 407 reads, in pertinent part:

> Under regulations prescribed by the Secretary of the Interior, the timber on unallotted trust land in Indian reservations or on other land held in trust for tribes may be sold in accordance with the principles of sustained-yield management or to convert the land to a more desirable use.

[10]The regulations, entitled "General Forest Regulations," reach nearly every aspect of tribal timber operations including approval of advertisement of sales, § 163.8, deposit requirements, § 163.10, acceptance and rejection of bids, § 163.11, required form contracts, § 163.12, bond requirements, § 163.14, acceptable payment terms, § 163.15, and fire management measures, § 163.21.

transaction involving timber harvested on Indian land. Therefore, to the extent there is a conflict between state commercial law and federal laws affording heightened protection to Indian trust timber, the former must give way.

Summary judgment was properly granted to the tribe. Title to the logs remained with the United States as the tribe's trustee, and the tribe is entitled to the proceeds from sale of the logs. To the extent state commercial law would yield a different outcome, it is deemed preempted.[11]

AFFIRMED.

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[11]Because federal law trumps here regardless of what the outcome would be under the UCC, we don't reach whether the bank's interpretation of the UCC is correct.

Appendix B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

In re BLUE LAKE FOREST PRODUCTS, INC., a California corporation,	No. C-91-1911-SBA Bankrtupcy No. 91-10333 Adv. No. 91-1108
Debtor.	Filed July 15, 1992
The HOOPA VALLEY TRIBE, a federally-recognized Indian Tribe, on its own behalf and as parens patriae for its members,	AMENDED ORDER GRANTING PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT (Supersedes Order Filed March 18, 1992)
Plaintiff,	
v.	
BLUE LAKE FOREST PRODUCTS, INC., a California corporation, et al.,	
Defendants.	

ARMSTRONG, District Judge.

This case arises out of a transaction for the sale of logs owned by the United States in trust for the plaintiff Hoopa Valley Tribe ("the Tribe") to defendant Blue Lake Forest Products, Inc. ("Blue Lake"). The timber at issue was cut from a portion of trust land of the Hoopa Valley Reservation known as the Pine Creek L timber sale area. The principal dispute before the court is between the Tribe and defendant The Hongkong and Shanghai Banking Corporation Limited ("the Bank"), which had a security interest in Blue Lake's inventory, as to the proceeds from Blue Lake's sale and processing of the logs.

The Tribe has moved for summary judgment on the First Claim of the Complaint. Blue Lake filed a statement of nonopposition to the motion for summary judgment. Having carefully considered all of the papers submitted by the parties, the Tribe's motion for partial summary judgment is hereby GRANTED.

BACKGROUND

The Hoopa Valley Tribe of the Hoopa Valley Reservation, California is a federally-recognized Indian tribe. The Hoopa Valley Indian Reservation was set apart by the United States in 1864 within the ancestral homeland of the Hoopa Valley Tribe. The Reservation boundaries were first delineated by executive order in 1876. Pursuant to the Hoopa-Yurok Settlement Act, 25 U.S.C. § 1300i, *et seq.*, the present Hoopa Valley Reservation was separated from other Indian lands in 1988. The Act provided that, upon fulfillment of certain conditions, "the unallotted trust

land and assets of the Hoopa Valley Reservation shall thereafter be held in trust by the United States for the benefit of the Hoopa Valley Tribe." 25 U.S.C. § 1300i-1(b). That provision took effect on December 7, 1988.

The Hoopa Valley Development Enterprise, formerly known as Hoopa Valley Development Corporation, is a wholly-owned subordinate body of the Tribe. The Enterprise oversees a number of Reservation economic activities including its logging company, Hoopa Forest Industries ("HFI").

The Department of the Interior's Bureau of Indian Affairs regulates and oversees the protection, development and production of tribal timber. General authority for commercial logging on Indian reservations was granted by act of Congress in 1910, 36 Stat. 855, 857, which, as amended, is codified at 25 U.S.C. § 407. That section provides:

> Under regulations prescribed by the Secretary of the Interior, the timber on unallotted trust land in Indian reservations or on other land held in trust for tribes may be sold in accordance with the principles of sustained-yield management or to convert the land to a more desirable use. After deduction, if any, for administrative expense under section 413 of this title, the proceeds of the sale shall be used--
> (1) As determined by the governing bodies of the tribes concerned and approved by the Secretary, or

(2) In the absence of such a governing body, as determined by the Secretary for the tribe concerned.

The Interior Department's General Forest Regulations governing the management of Indian forest lands cite as one of their objectives "[t]he development of Indian forests by Indian people to promote self-sustaining communities, so that Indians may receive from their own property not only the stumpage value, but also the benefit of whatever labor and profit it is capable of yielding." 25 CFR 163.3(d). "Stumpage value" of Indian timber is defined as "the value of uncut timber as it stands in the woods." 25 CFR 163.1.

The General Forest Regulations require that contract forms approved by the Secretary be used for large timber sales such as Pine Creek L. 25 CFR 163.12. The Interior Department's published Standard Provisions are part of those approved forms.

On June 27, 1990, a multi-year Timber Contract for the Sale of Estimated Volumes covering the Pine Creek L logging unit on tribal lands of the Hoopa Valley Indian Reservation was entered into between the Tribe, as seller, HFI, as purchaser, and the Bureau of Indian Affairs, Sacramento Area Director, as approving officer ("The Timber Sale Contract"). The Timber Sale Contract recites that it is made under authority of 25 U.S.C. § 407 and in accordance with the regulations of 25 CFR Part 163 and subject to the "attached part B, Standard Provisions."

Section B2.1 of the Timber Sale Contract Part B Standard Provisions states: "Title to the timber covered by the contract shall not pass to the Purchaser until it has been

scaled, *paid for*, and removed from the contract area." (Emphasis added).

Effective July 1, 1990, HFI and its parent company, Hoopa Valley Development Enterprises, entered into a Log Purchase Agreement with Blue Lake. The Log Purchase Agreement was signed one day after the Timber Sale Contract. Paragraph 2 of the Log Purchase Agreement provided:

> No provision of this Agreement will be interpreted or enforced in any manner which violates Title 25 U.S.C. § 407, or any other provision of federal law, or the regulations established by the Secretary of the Interior for Indian timber management found in Part 163 of Title 25, Code of Federal Regulations, which laws and regulations are incorporated herein.

Between July 1, 1990 and October 31, 1991, HFI cut, scaled and delivered to Blue Lake a net volume of 11,565,120 board feet of Reservation timber. Stumpage for deliveries through August 31, 1990 was paid for. However, stumpage for deliveries made in September and October 1990, in the amount of $954,248, remains unpaid.

On February 19, 1991, Blue Lake filed a petition for reorganization under Chapter 11 of the Bankruptcy Code. On that date, approximately 1-1/2 to 2 million board feet of logs from the Hoopa Valley Reservation were located on Blue Lake's premises. The logs at issue were branded and marked with red paint to indicate their origin on the Hoopa Valley Indian Reservation. Rejecting requests that they cease cutting logs from the Hoopa Reservation, Blue Lake

thereafter fully processed the Reservation-origin logs through its mill.

On the day following the filing of Blue Lake's Chapter 11 petition, the United States Bankruptcy Court granted Blue Lake's Motion for Authority to Enter Stipulated Order Providing Adequate Protection and Authorizing Obtaining of Credit. The Stipulated Order noted the existence of the Hoopa claims and provided that all payments by Blue Lake to the Bank would be subject to the same claims that existed against logs possessed by Blue Lake.

The Bank had loaned funds to Blue Lake since 1987 pursuant to various credit agreements. It is undisputed that the Bank at all relevant times had a perfected security interest in Blue Lake's current and after-acquired inventory.

DISCUSSION

The Tribe seeks a judgment establishing that its rights to the proceeds from Blue Lake's processing and sale of the logs for which payment to the Tribe was not made are superior to those of the Bank. The Bank contends that its rights to the proceeds are superior to those of the Tribe regardless of whether title to the logs remained in the United States in trust for the Tribe.[12]

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[12] The court holds that title to the logs for which payment was never made remained at all times in the United States in trust for the Tribe. The court rejects, and indeed does not follow the logic of, the Bank's suggestion

(continued...)

The Bank's position is that federal laws governing the alienation of Indian timber do not conflict with those provisions of the U.C.C. relating to an "innocent" third-party lender like the Bank and that the Bank is therefore entitled to the proceeds as a "good faith purchaser" under U.C.C. § 2-403(1). The Tribe contends that the federal laws which restrict the alienation of Indian timber necessarily preclude a third party such as the Bank from obtaining rights, superior to the Tribe's, to the proceeds from the sale and processing of those logs. The Tribe argues that it prevails even if federal law regarding the alienation of Indian timber does not preempt the application of U.C.C. principles to this case, because the Bank, in any event, is not entitled to "good faith purchaser" status under U.C.C. § 2-403(1).

It is the Bank's analysis that falls short. Citing no authority for the application of U.C.C. good-faith purchaser principles to disputes involving Indian trust

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[12](...continued)
in footnote 3 of its Supplemental Memorandum that, notwithstanding the government-required language to the contrary, title may have passed from the United States because of the statement in paragraph 23 of the Log Purchase Agreement that "[s]tumpage shall be paid for immediately upon passage of title." The court does not see how such language indicates either an intention of the Tribe to pass title to Blue Lake before payment was made or a contradiction of the government prescribed language rendering passage of title contingent upon payment.

property,[13] the Bank argues that those principles accord the Bank priority over the Tribe because they "do not conflict with" federal laws restricting the alienation of Indian timber. But the very premise of the Bank's position is that the U.C.C. brings about a result that is *different* from the result that would arise if U.C.C. principles were not applied. The Bank's logic is untenable: the Bank first applies U.C.C. principles as the vehicle for *determining* whether there is a conflict between U.C.C. principles and federal laws regulating the alienation of Indian timber and concludes from those principles that there is no such

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[13] The Bank notes that the court applied *other* U.C.C. principles to a dispute involving Indian timber in *In re Humboldt Fir, Inc.*, 426 F.Supp. 292 (N.D.Cal.1977), *aff'd*, 625 F.2d 330 (9th Cir. 1980). But in doing so the court said that state laws may not apply to a dispute involving tribal trust property, 426 F.Supp. at 296, and that the application of U.C.C. principles was appropriate only "to the extent that [such application] does not conflict with the Federal interest in developing and protecting the use of Indian resources." 426 F.Supp. at 297. In *Humboldt Fir*, the U.C.C. provisions were considered because, unlike here, they *supported* the tribe's position. *Compare Pajarito American Indian Art, Inc. v. Lyon*, 7 B.R. 343 (D.Ariz.1980) (Because federal statutes barred the sale of Sioux Indian ghost dance shield which had eagle feathers attached to its face, the Uniform Commercial Code did not control and original owners, not subsequent purchasers, prevailed).

conflict; the Bank then applies the U.C.C. to reach its conclusion that its rights to the proceeds are superior to those of the Tribe, conceding implicitly, however, that without the benefit of U.C.C. principles, one would not reach that result.

Endemic to the Bank's analysis is the implicit assumption that the court should apply the same analysis in this case as it would apply in a case not involving tribal trust property. Without expressly saying as much, the Bank effectively asks the court to accept the proposition that if, say, "Boise-Cascade" were substituted for the Tribe as the selling party in this case and the U.C.C. was interpreted to render the Bank's rights superior to the rights of Boise-Cascade, then the Bank would necessarily also prevail over the Tribe.

The court cannot accept that logic. To do so would be to disregard the principle, ensconced in American jurisprudence, that tribal trust property is afforded extraordinarily heightened protection. That heightened protection is justified by the unique historical origins of tribal sovereignty and the federal government's special trust relationship with the tribes. *See generally Bryan v. Itasca County*, 426 U.S. 373, 96 S.Ct. 2102, 48 L.Ed.2d 710 (1976); *In re Humboldt Fir, Inc.*, 426 F.Supp. 292, 296 (N.D.Cal. 1977), *aff'd*, 625 F.2d 330 (9th Cir. 1980); F. Cohen's Handbook of Federal Indian Law, 508-510 (1982 ed.).

In particular, section 4(b) of Pub.L. [83-]280, 28 U.S.C. § 1360(b), which the Bank ignores in its papers, provides that nothing in Congress' authorizing state courts to adjudicate civil controversies involving Indians "shall

authorize the alienation, encumbrance, or taxation of any real or personal property ... belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States...." The United States Supreme Court has described section 1360(b) as establishing an "express prohibition" of any alienation, encumbrance, or taxation of any tribal trust property. *Bryan*, 426 U.S. at 391, 96 S.Ct. at 2112. The Supreme Court has also said that section 1360(b) can be read as prohibiting state courts "from applying state laws or enforcing judgments in ways that would *effectively result in* the 'alienation, encumbrance, or taxation' of trust property." *Id.* (Emphasis added.)

It could be argued, to be sure, that this statute does not apply to a dispute, such as this, over proceeds from the inventory of a non-tribal debtor--although, as indicated, the Bank has not bothered to acknowledge the statute much less to advance an argument for its inapplicability to this case. It could be argued that the statute's prohibition against a *state* court's application of state laws effecting the alienation or encumbrance of trust property does not prohibit *federal* courts from doing the same thing, although there would seem to be little basis for such a distinction. *See Humboldt Fir*, 426 F.Supp. at 296 ("Where a dispute involves trust or restricted property, the state may not adjudicate the dispute *nor may its laws apply*.") (Emphasis

added).[14] It could also be argued that granting a secured party priority in the proceeds from tribal trust property obtained by the secured creditor's debtor without payment to the Tribe does not technically effect the "alienation" or "encumbrance" of tribal trust property. The Bank's security interest, after all, was in Blue Lake's property, not the Tribe's or the federal government's, and granting the Bank priority to the proceeds does not technically preclude the Tribe's right of action against Blue Lake for compensation for its acquisition of logs as to which title never passed.

The Supreme Court, however, has construed Section 1360(b) as precluding the enforcement of judgments that "effectively result" in the alienation or encumbrance of tribal trust property. *Bryan*, 426 U.S. at 391, 96 S.Ct. at 2112. And it is at least arguable that enforcing a state law lien so as to give the Bank priority over the Tribe in proceeds from logs as to which title, under federal law, never left the United States in trust for the Tribe (and where the logs, themselves, no longer exist), is the "effective" alienation of tribal trust property.

At worst, section 1360(b)'s applicability here is uncertain. Indeed, the Supreme Court has described the

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[14] Nor would it make sense to escape the scope of section 1360(b) by purporting to apply a "federal" law of contracts incorporating U.C.C. principles because incorporating such state-based principles is only appropriate "to the extent that [they do] not conflict with the Federal interest in developing and protecting the use of Indian resources." *Humboldt Fir*, 426 F.Supp. at 297.

statute as "admittedly ambiguous." *Id.* at 392, 96 S.Ct. at 2112. But the Supreme Court has also said that

> In construing this 'admittedly ambiguous' statute, *Board of Comm'rs v. Seber*, 318 U.S.[705] at 713, 63 S.Ct. [920] at 925 [87 L.Ed. 1094], we must be guided by that 'eminently sound and vital canon,' *Northern Cheyenne Tribe v. Hollowbreast*, 425 U.S. 649, 655 N. 7, 96 S.Ct. 1793, 1797, 48 L.Ed. 2d 274 (1976), that 'statutes passed for the benefit of dependent Indian tribes ... are to be liberally construed, doubtful expressions being resolved in favor of the Indians.' *Alaska Pacific Fisheries v. United States*, 248 U.S. 78, 89, 39 S.Ct. 40, 42, 63 L.Ed. 138 (1918). [Other citations omitted.]

Id. Resolving its doubts regarding section 1360(b) in favor of the Indians, this court concludes that the Bank is precluded from asserting over the Tribe its priority in the proceeds from the logs, notwithstanding that the Bank *may* have prevailed as a "good faith purchaser" if U.C.C. principles had been applied.[15]

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[15] The court does not formally reach whether or not the Bank would have so prevailed under the U.C.C. However, the court is inclined to agree with the Tribe that the unique heightened restrictions governing the alienation of Indian trust property rendered the title passed to Blue Lake void, rather than voidable, and that the Bank would

(continued...)

The court notes that to the extent this holding favors Indian property rights over "innocent" third parties, it is consistent with a long line of judicial decisions that have done the same. *See Oneida Indian Nation of New York State v. Oneida County*, 434 F.Supp 527 (N.D.N.Y.1977) (good faith in acquiring property will not render good a title which otherwise is not valid for failure to comply with the Indian Nonintercourse Act), *aff'd*, 719 F.2d 525 (2d Cir.1983), *aff'd in relevant part, Oneida County v. Oneida Indian Nation of New York State*, 470 U.S. 226, 105 S.Ct. 1245, 84 L.Ed.2d 169 (1985) (Under the supremacy clause, state law time bars such as adverse possession and laches do not apply of their own force to Indian land title claims; *Mohegan Tribe v. State of Connecticut*, 528 F.Supp. 1359 (D.Conn. 1982) (where state received title to Indian lands from private persons whose original grant was void, state's title was void); *Cayuga Indian Nation of New York v. Cuomo*, 771 F.Supp. 19 (N.D.N.Y.1991) (Indians could not be precluded from asserting invalidity of agreement under which they had purportedly ceded lands to the state of New York on grounds that the land had been occupied by generations of owners over a 175-year period and that real estate titles in large portion of two counties would be disrupted and landowners "irreparably harmed"). To the extent this holding implies a "preemption" of state

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[15](...continued)
therefore not be entitled to "good faith purchaser" status under U.C.C. § 2-403(1) even if the U.C.C. were applicable here.

commercial laws, such preemption is supported not only by the federal government's pervasive regulation of the alienation of Indian trust property but also by the Supremacy Clause of the Unites States Constitution which dictates that state law cannot supersede federally created rights, a principle "applied with especial vigor to the question of Indian title as a result of the federal government's 'unique obligation toward the Indians.'" *Narragansett Tribe of Indians v. Southern Rhode Island Land Development Corp.*, 418 F.Supp. 798, 804 (D.R.I.1976) quoting *Morton v. Mancari*, 417 U.S. 535, 555, 94 S.Ct. 2474, 2485, 41 L.Ed.2d 290 (1974); *see also White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 143, 100 S.Ct. 2578, 2583, 65 L.Ed.2d 665 (1980) ("The unique historical origins of tribal sovereignty make it generally unhelpful to apply to federal enactments regulating Indian tribes those standards of preemption that have emerged in other areas of the law.")

CONCLUSION

Accordingly, plaintiff's motion for summary judgment on the First Claim of the Complaint is hereby GRANTED. Blue Lake obtained and processed logs from the Pine Creek L timber sale of the Hoopa Valley Indian Reservation, having a stumpage value of $954,248, title to which remained in the United States in trust for the Tribe. Plaintiff is entitled to recover the value of those logs, now held by the Bank in the form of proceeds, without prejudice to the parties' ability to establish in further proceedings before this court that the recovery for the logs

and their products should be less than or greater than the stumpage value.

As there remains unresolved the issue of the precise dollar amount to which the Tribe is entitled, the parties shall appear for a status conference on Thursday May 21, 1992, at 3:45 p.m. The parties shall submit status conference statements, or a joint one if possible, in accordance with the Local Rules, not less than ten days prior to the status conference. Should the remaining issue be resolved before that date, with judgment entered accordingly, the status conference will be vacated.

IT IS SO ORDERED.

Appendix C

Not for Publication

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

In re BLUE LAKE FOREST PRODUCTS, INC., a California corporation,	)	No. 92-16622
	)	D.C. No. CV91-01911-SBA
Debtor.	)	Filed: September 27, 1994
The HOOPA VALLEY TRIBE, a federally-recognized Indian Tribe, on its own behalf and as parens patriae for its members,	)	Cathy A. Catterson, Clerk U.S. Court of Appeals
Plaintiff-Appellee,	)	ORDER
v.	)	

HONGKONG AND SHANGHAI BANKING CORPORATION, LIMITED, a foreign corporation,

Defendant-Appellant,

and

BLUE LAKE FOREST PRODUCTS, INC., a California corporation; BRUCE TAYLOR, SR., and SUSAN F. TAYLOR,

Defendants.

Before: FLETCHER, KOZINSKI and TROTT, Circuit Judges.

The petition for rehearing is denied.